UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

In Re Subpoena to Daniel McLean in Jacob R. Kent, *et al.*, v. R.L. Vallee, Inc., *et al.* No. 617-6-15 Cncv	)))))	Case No. 2:18-cv-201-wks

MOTION AND SUPPORTING MEMORANDUM TO QUASH SUBPOENA ISSUED TO UNITED STATES SENATOR BERNARD SANDERS' EMPLOYEE DANIEL McLEAN

COME NOW the Office of United States Senator Bernard Sanders, and Daniel McLean, an employee of the Senator's office, through undersigned counsel,[1] and hereby respectfully move this Court for an order quashing the subpoena issued by defendant R.L. Vallee, Inc. ("Vallee") to Mr. McLean for the production of testimony and documents at a deposition on the last day upon which discovery may be taken in the above-captioned case, which has been pending for almost three and a half years in the Superior Court of Vermont in Chittenden County. This subpoena was removed to this Court in accordance with 28 U.S.C. §§ 1442(a) & 1446.

As more fully explained below, the subpoena should be quashed for at least three reasons. *First*, it is the law of this Circuit that sovereign immunity bars enforcement of a subpoena to a federal employee for information obtained in the course of his employment, absent an express and unequivocal waiver of that immunity by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq*. The APA sovereign immunity waiver does not apply to the instant state court subpoena for two independent reasons: (i) the statutory waiver, by its express terms, does not apply to actions or subpoenas in *state* court. Because this Court's jurisdiction

[1] Undersigned counsel's appearance in this matter on behalf of the Senator's office and Mr. McLean is pursuant to S. Res. 706, 115th Congress.

upon removal is derivative of the jurisdiction of the state court from which the subpoena was removed, the APA sovereign immunity waiver is equally inapplicable upon the state court subpoena's removal to this Court; and (ii) even if this Court's jurisdiction upon removal were not derivative of the jurisdiction of the underlying state court, the APA's sovereign immunity waiver, again by its express terms, does not include the Congress. The absence of an express and unequivocal waiver of sovereign immunity requires quashal of the instant subpoena.

Second, the Speech or Debate Clause of the Constitution affords the Senator's office and Mr. McLean an absolute immunity against the compelled production of testimony and documents in this case. Senator Sanders has a longstanding legislative interest and concern about the price of gas nationally, as well as in northwest Vermont as compared to the rest of the state. He has exercised his legislative authority as a United States Senator to investigate and legislate with regard to this matter over many years. The instant subpoena issued by defendant Vallee in an action alleging gasoline price fixing in northwest Vermont directly threatens the Senator's legitimate exercise of his legislative duties and the due functioning of his legislative office by demanding production from Mr. McLean, over almost a seven-year period, of potentially every document related to gas prices, as well as documents having no apparent connection whatsoever to gas prices. The wholesale invasion into congressional files demanded by Vallee's subpoena is barred by the constitutional protections to legislative independence afforded by the Speech or Debate Clause, as enforcement of Vallee's subpoena "certainly would 'chill' any congressional inquiry; indeed, it would cripple it." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 419 (D.C. Cir. 1995).

Finally, even if this Court determined that sovereign and legislative immunity did not deprive the Court of the jurisdiction necessary to proceed, the subpoena should be quashed because it presents an undue burden, insofar as the subpoena is overbroad, lacks particularity, seeks irrelevant information, seeks documents over an unreasonably long period of time, and impermissibly interferes with the due functioning of the Senator's office.

BACKGROUND

The plaintiffs in the underlying state court action commenced in June 2015 are Vermont citizens who allege that Vallee and the three other companies named as defendants have engaged in price fixing in violation of the Vermont Consumer Protection Act, 9 V.S.A. § 2453(a). Defendants' dismissal motions were denied in a May 7, 2016 thirty-eight page memorandum opinion, and discovery ends on December 3, 2018.

The negotiated resolution of a prior subpoena to Mr. McLean. In the spring of 2018, Champlain Oil, one of the other defendants in this case, served on Mr. McLean a deposition subpoena commanding the production of testimony and documents. Following a series of productive telephone conversations between undersigned counsel and counsel for Champlain Oil regarding the Senate's rules and privileges implicated by the subpoena, a negotiated resolution was reached by which the subpoena was withdrawn in exchange for Mr. McLean conducting an extensive search for any documents he had provided to counsel for plaintiffs in this case and which had not already been produced. Two documents, which were public, were identified and produced by undersigned counsel, on the Senator's office's behalf, pursuant to that agreement.

The Senate's efforts to avoid litigation over this subpoena. In advance of the issuance of the instant subpoena, undersigned counsel, on behalf of Senator Sanders' office, reached out to

counsel for Vallee in an effort to avoid litigation over it. In conversations on November 6 and 7, 2018, undersigned counsel informed Vallee's counsel that Senator Sanders' office was willing to pursue a negotiated resolution of Vallee's evidentiary requests, and undersigned counsel suggested some possibilities for consideration in furtherance thereof. Undersigned counsel further informed Vallee's counsel that under the Standing Rules of the United States Senate, which are promulgated pursuant to the Rulemaking Clause, art. I, § 5, cl. 2, of the Constitution, testimony and non-public Senate documents cannot be produced by a Member, officer, or employee of the Senate without the permission of the Senate.[2] Accordingly, undersigned counsel explained that parties seeking the production of Senate evidence in legal proceedings typically submit a written, particularized request explaining the direct relevance, strong need, and alternative unavailability of the evidence sought in support of an application seeking Senate authorization for the production of such evidence. Finally, undersigned counsel apprised

[2] *See* Rule XI.1, Standing Rules of the Senate ("No memorial or other paper presented to the Senate . . . shall be withdrawn from its files except by order of the Senate."); S. Res. 490, 97th Cong., 2d Sess. (1982) (stating, in setting out mechanism for authorization of production of Senate evidence when the Senate was not in session, that "by the privileges of the Senate of the United States and Rule XI of the Standing Rules of the Senate, no evidence under the control or in the possession of the Senate can, by the judicial or administrative process, be taken from such control or possession but by permission of the Senate"); Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, S. Doc. No. 28, 101st Cong., 2d Sess. 1240 n.21 (1992) (recognizing that "resolutions that authorize Senate testimony or the production of Senate records recite (with variations appropriate to the case) that 'by the privileges of the United States Senate and Rule XI of the Standing Rules of the Senate, no evidence under the control or in the possession of the Senate can, by the judicial process, be taken from such control or possession but by permission of the Senate. . . .'"). *See, e.g.,* S. Res. 519, 115th Cong. (authorizing Senate staffer pre-trial and trial testimony requested by the defendant in state court trespass action on Senate office); S. Res. 457, 115th Cong. (authorizing Senate staffer deposition testimony requested by plaintiff in state court civil commercial dispute).

Vallee's counsel that sovereign immunity and legislative immunity would preclude any attempt to compel judicially the production of evidence in this case.

Vallee's counsel declined undersigned counsel's suggestions to negotiate a resolution of Vallee's evidentiary requests and did not offer any alternative suggestions to forestall litigation. Vallee's counsel also did not submit a written request in support of any application for Senate authorization for the production of testimony or documents. Vallee's counsel's only request was for undersigned counsel to obtain authorization to accept service of the instant subpoena. Accordingly, since the Senate has not authorized the production of evidence in this case, Mr. McLean is precluded from testifying and neither he nor the Senator's office may produce non-public Senate documents under the Senate's rules.

Vallee's subpoena. Vallee's subpoena demands deposition testimony on December 3, 2018, the last day of the discovery period of this state court action initiated in 2015, and the production at that deposition of what would likely be thousands of documents falling within the forty-two expansive categories of information sought for the time period January 1, 2009 to September 22, 2015. *See* Exh. 1 (setting out thirteen categories of information in Request No. 1 followed by twenty-nine additional Requests).

Overall, the subpoena demands from Mr. McLean "all documents" in some way related to gas pricing or competition, the subject matter of the state court suit, including "legislative hearings," "investigations," communications internal to the Senator's office and the Senate, and external communications with various federal and state agencies, the litigants in this case, and plaintiffs' counsel, among others. *Id.* Remarkably, over half of the categories for which documents are sought are not limited to the subject matter of this suit. *Id*. at Request Nos. 1 (six

categories), 7, 8-18, 20-23, 27-29. Some categories, such as the demand for "all documents and communications" with the Senator's wife or with anyone in the Senator's office or his campaign "regarding the possible 2012 or 2018 United States Senate candidacy of Rodolphe ("Skip") Vallee or James Douglas" have no apparent connection to this case at all. *Id*. at Request No. 21.

ARGUMENT

I. Sovereign Immunity Renders the Subpoena Unenforceable.

This Court lacks jurisdiction to enforce Vallee's subpoena. "It is long settled law that, as an attribute of sovereign immunity, the United States and its agencies may not be subject to judicial proceedings unless there has been an express waiver of that immunity." *EPA v. Gen. Elec. Co.*, 197 F.3d 592, 597 (2d Cir. 1999) (citations omitted), *amended on other grounds*, 212 F.3d 689 (2d Cir. 2000).

Subpoena proceedings "fall within the protection of sovereign immunity even though they are technically against the federal employee and not against the sovereign." *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989); *Gen. Elec. Co.*, 197 F.3d at 597 ("[E]nforcement of this [federal] subpoena duces tecum issued . . . to [an EPA employee] would compel the EPA to act and therefore is barred by sovereign immunity in the absence of a waiver. . . ."); *COMSAT Corp. v. Nat. Science Found*., 190 F.3d 269, 277 (4th Cir. 1999) ("[I]t is sovereign immunity . . . that gives rise to the Government's power to refuse compliance with a subpoena. . . .").

The protections of sovereign immunity extend to Members of Congress, their offices, and their employees. *See, e.g., Library of Congress v. Shaw,* 478 U.S. 310, 314-15 (1986) (Legislative Branch agency); *Danihel v. Office of the President of the United States*, 616 F. App'x 467, 470 n.2 (3d Cir. 2015) (Members of Congress); *Rockefeller v. Bingaman*, 234 F.

App'x 852, 853-54 (10th Cir. 2007) (Houses and Members of Congress).[3] Accordingly, the protections of sovereign immunity extend to the Senator's office and his employee subpoenaed to produce testimony and documents in the underlying state court case.

Absent a waiver of sovereign immunity, therefore, Vallee's subpoena is unenforceable as this Court lacks jurisdiction to proceed. *In re SEC ex rel. Glotzer*, 374 F.3d 184, 190, 192 (2d Cir. 2004) (granting government's mandamus petition and "vacat[ing] for lack of jurisdiction" district court order requiring SEC employee testimony in federal case, stating "[i]n the absence of an applicable waiver of sovereign immunity, the district court lacked subject matter jurisdiction" to proceed). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996). "Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Id*. The party proceeding against the federal government carries the burden of demonstrating that a waiver of sovereign immunity exists. *Marakova v. United States,* 201 F. 3d 110, 113 (2d Cir. 2000).

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[3] *See also SEC v. Committee on Ways and Means*, 161 F. Supp. 3d 199, 217 & n.5 (S.D.N.Y. 2015) (stating, upon canvassing case law in subpoena enforcement action against congressional staffer and congressional committee, that "[c]onsidered together, these cases demonstrate that the doctrine of sovereign immunity (i) encompasses Congress and Members of Congress acting in their official capacities, and (ii) applies where private parties have brought subpoena enforcement actions against Federal agencies"); *McLean v. United States*, 566 F.3d 391, 401 (4th Cir. 2009) (Congress); *Liverman v. Committee on the Judiciary, U.S. House of Representatives*, 51 F. App'x 825, 826 (10th Cir. 2002) (congressional committee); *Voinche v. Fine*, 278 F. App'x 373 (5th Cir. 2008) (Members of Congress); *Keener v. Congress*, 467 F.2d 952, 952 (5th Cir. 1972) (Congress); *Cartwright v. Walsh,* 2018 WL 461236, at *2 (M.D. Pa. Jan. 18, 2018) (Congressman and his employee); *Khaja v. Husna*, No. 5:13-cv-25, at 3 (E.D.N.C. April 9, 2013) (congressional staffer) (Exh. 2, hereto).

Binding precedent precludes Vallee from carrying its burden of demonstrating the waiver of sovereign immunity necessary to permit enforcement of its subpoena. The Second Circuit has held that:

> The rules governing discovery and the issuance of subpoenas duces tecum for the production of documents by third parties include *no express waivers* of the type necessary to subject the government to compulsion in judicial proceedings to which it is not a party. *The only express waiver* to be found in this regard is in the APA . . . [which] allows final agency actions to be reviewed by federal courts . . . .

Gen. Elec. Co., 197 F.3d at 598 (emphasis added); *see also id*. at 599 (stating "[w]e are in agreement with th[e] holding . . . [of] the district court . . . that the APA provides *the only* express waiver of immunity" to enforce the subpoena) (emphasis added); *Glotzer*, 374 F.3d at 190, 192 (reaffirming *General Electric Co*., stating "[a]bsent a waiver of sovereign immunity, a federal agency, as representative of the sovereign, cannot be compelled to act").

The APA cannot supply the waiver of sovereign immunity required to enforce this subpoena for two independent reasons. *First*, the APA's waiver of sovereign immunity does not apply to suits or subpoenas in *state* court. *See* 5 U.S.C. § 702 (confining APA sovereign immunity waiver to "a court of the United States" to review certain "agency" action). Because the APA does not waive the sovereign immunity in state court of *any* federal executive, legislative, or judicial agency, officer, or employee, third-party subpoenas directed to federal entities and individuals are unenforceable in state court. *See Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1211 (D.C. Cir. 1996) ("In state court the federal government is shielded by sovereign immunity, which prevents the state court from enforcing a subpoena."); *State of La. v. Sparks*, 978 F.2d 226, 235 & n.16 (5th Cir. 1992) (same).

That remains equally true where, as here, the state court subpoena was removed to federal court under 28 U.S.C. § 1442, because the jurisdiction of the federal court upon removal is derivative of, and limited to, the jurisdiction of the state court from which the subpoena was removed. *See Arizona v. Manypenny*, 451 U.S. 232, 242 n.17 (1981) ("It is well settled that if the state court lacks jurisdiction over the subject matter or the parties, the federal court acquires none upon removal, even though the federal court would have had jurisdiction if the suit had originated there.").

Thus, "because a federal court's jurisdiction upon removal under 28 U.S.C. § 1442(a)(1) is derivative of the state court jurisdiction, the federal court can acquire no jurisdiction to enforce a state court subpoena or order upon removal." *United States v. Williams*, 170 F.3d 431, 433 (4th Cir. 1999) (quotation marks omitted); *see also In re Elko Cnty. Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997) (stating that "because this case was removed from the state court pursuant to § 1442 our jurisdiction is derivative of the state court's jurisdiction" and quashing subpoena); *Houston Bus. Journal*, 86 F.3d at 1212 ("[B]ecause a federal court's jurisdiction upon removal is derivative of the state court's, the federal court in a removed action is also barred from enforcing a subpoena against the federal government."); *Sparks*, 978 F.2d at 235 & n.16 (quashing defendant's state court subpoena in death penalty case, stating "myriad cases involving a § 1442(a) removal of a state subpoena proceeding against an unwilling federal officer have held that the sovereign immunity doctrine bars enforcement of the subpoena . . . .") (collecting cases)). Accordingly, because the APA sovereign immunity waiver does not apply to any actions in state court, and this Court's jurisdiction is derivative of the state court's jurisdiction, the APA sovereign immunity waiver does not apply here.

Second, even if this Court's jurisdiction were not limited to that of the underlying state court, the APA sovereign immunity waiver is inapplicable here for the additional, independent reason that the waiver, by its express terms, excludes the Congress. *See* 5 U.S.C. § 702 (waiving sovereign immunity of certain "agency" action); *id.* § 701(b)(1)(A) (defining "agency" for which sovereign immunity waiver applies as excluding "the Congress"); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 524, 525 n.6 (2009) (plurality) (stating that APA "does not apply to Congress" because the statutory definition of "agency . . . specifically excludes 'the Congress'") (collecting cases, citing 5 U.S.C. § 551(1)(A)); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 99-100 (D.D.C. 1999) (holding that APA's waiver of sovereign immunity was not applicable to Legislative Branch), *aff'd*, 38 F. App'x 4 (D.C. Cir. 2002) (per curiam). Accordingly, while "Congress, of course, has waived its [sovereign] immunity for a wide range of suits," *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999), a suit or subpoena under the APA is not one of them.[4]

In sum, because the APA cannot supply the waiver of sovereign immunity necessary to enforce this subpoena, and that statute is "*the only express waiver* to be found . . . to subject the government to compulsion in judicial proceedings," *Gen. Elec. Co.*, 197 F.3d at 598 (emphasis added), sovereign immunity renders the instant state court subpoena unenforceable. *See, e.g.*, *Boron Oil*, 873 F.2d at 68 (quashing subpoena for EPA evidence gathered investigating service station gas leak); *In re Elko Cnty. Grand Jury*, 109 F.3d at 555-56 (holding that state court

[4] Thus, although the Senate, like the federal executive agencies, has a process by which parties may seek the production of testimony or nonpublic Senate documents by a Member, officer, or employee of the Senate, *see* page 4 and note 2, *supra*, its determinations are not subject to judicial review under the APA because that statute does not apply to the Congress.

"lacked jurisdiction to issue" grand jury subpoena to Forest Service employee); *Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994) ("[T]he cases involving § 1442(a) removals of state subpoena proceedings against unwilling federal officers have held that sovereign immunity bars the enforcement of the subpoena."); *Louisiana v. Scire*, 1994 WL 35595, at *1-*2 (5th Cir. Jan. 26, 1994) (quashing in state capital case defendant's subpoena for testimony of federal prosecutor who allegedly conspired to suppress *Brady* evidence).[5]

The subpoena, therefore, must be quashed, as this Court is without jurisdiction to adjudicate the withholding of information sought by it. *See Glotzer*, 374 F.3d at 192; *Pollock v. Barbosa Group, Inc.*, 478 F. Supp. 2d 410, 414 (W.D.N.Y. 2007) (quashing removed state court subpoena and stating "the Court lacks the jurisdiction to determine whether plaintiff has complied with the pertinent [agency] regulations. Nor can the Court determine whether the agencies are improperly withholding documents."); *Khaja*, No. 5:13-cv-25, at 3 (Exh. 2) (stating, in quashing North Carolina state court subpoena to House of Representatives staffer arising out of constituent casework, that "sovereign immunity precludes this court . . . not only from exercising jurisdiction to compel [staffer] to comply with the subpoena over his objections to it, but also the authority to review and set aside the objections and the House rule pursuant to which they were made"); *Omni Pinnacle, L.L.C. v. All South Consulting Engineers, L.L.C.*, 2012 WL

[5] *See also Vermont v. Patten*, 2010 WL 11610366, at *1 (D. Vt. Feb. 4, 2010) (quashing on sovereign immunity grounds state court subpoena issued to federal immigration employees in state criminal case); *Cartwright,* 2018 WL 461236, at *2 (holding that "the doctrine of sovereign immunity bars this court from enforcing [constituent's] subpoenas" for testimony and documents issued to Member of Congress and his employee in Pennsylvania state court case); *Reverse Mortgage Solutions, Inc. v. Kennedy*, 2018 WL 2086861, at *4 (E.D. Pa. May 4, 2018) (quashing on sovereign immunity grounds Pennsylvania state court subpoena to federal postal employee in civil action).

12296176, at *3 (E.D. La. Sept. 7, 2012) ("Without subject matter jurisdiction, the Court may not evaluate whether the USDA made a reasonable decision in refusing to permit [employee] to testify based on USDA regulation.").

II. The Speech or Debate Clause Bars the Compelled Production of Testimony or Documents Regarding Matters Within the Legislative Sphere.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Clause ensures that the "legislative function the Constitution allocates to Congress may be performed independently," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975), "without regard to the distractions of private civil litigation or the perils of criminal prosecution." *Brown & Williamson,* 62 F.3d at 415. Because "the guarantees of [the Speech or Debate] Clause are vitally important to our system of government," they "are entitled to be treated by the courts with the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). "Without exception," the Supreme Court has "read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501.

In addition to immunizing Members of Congress from suit for matters arising from their legislative activities, the Speech or Debate Clause provides "a testimonial and non-disclosure privilege" that protects Members "from being compelled to answer questions about legislative activity or produce legislative materials." *Howard v. Office of Chief Administrative Officer of U.S. House of Representatives*, 720 F.3d 939, 946 (D.C. Cir. 2013). "A party is no more entitled to compel congressional testimony – or production of documents – than it is to sue congressmen." *Brown & Williamson*, 62 F.3d at 421. This privilege provides Members with immunity from subpoenas for testimony, *Eastland*, 421 U.S. at 499 n.13, as well as for documents,

Brown & Williamson, 62 F.3d at 420; *Minpeco, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 857 (D.C. Cir. 1988); *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 248-49 (D.D.C. 1981).

Because "it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants," the Clause's protections extend beyond Members of Congress to congressional staff, "insofar as [the action at issue] . . . would be a protected legislative act if performed by [a] Member himself." *Gravel v. United States*, 408 U.S. 606, 616 (1972).

Where the Speech or Debate Clause privilege is raised in defense to a subpoena, the only issue is whether the matters about which evidence is sought "fall within the 'sphere of legitimate legislative activity.'" *Eastland*, 421 U.S. at 501. "[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Id.* at 503. Legislative activity protected by the Clause encompasses "anything 'generally done in a session of the House by one of its members in relation to the business before it.'" *Doe v. McMillan*, 412 U.S. 306, 311 (1973) (citation omitted). The Clause accordingly precludes inquiry into "the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House," *Gravel*, 408 U.S. at 625, which includes communication on matters "on which legislation may be had." *Eastland*, 421 U.S. at 508.

The subpoena at issue demands the production of testimony and documents falling within forty-two broad categories, for a nearly seven-year period, and seeks information regarding the Senator's exercise of his legislative authority concerning the conditions affecting gasoline prices in his home state and throughout the country. Such materials and information are directly pertinent to the Senator's legislative activities, and thus fall within the legislative sphere absolutely privileged under the Speech or Debate Clause.

Since he began serving in the Senate in 2007, Senator Sanders has served as a Member of the Senate Committee on Energy and Natural Resources ("Senate Committee"), which has jurisdiction to investigate and legislate on matters related to "energy policy, energy regulation and conservation[,] energy research and development[]" and "oil and gas production and distribution." Senate Rule XXV.1(g)(1). Following many questions from his constituents about what could be done about the high price of gas, Senator Sanders chaired an August 2012 hearing of the Senate Committee in Burlington, Vermont in an effort to "to understand why prices in northwest Vermont were so much higher than the rest of the Nation, the rest of New England, and, in fact, the rest of our country." Gasoline Prices in the State of Vermont: *Hearing Before the Comm. on Energy and Natural Resources*, 112th Cong. (2012), *available at*, https://www.gpo.gov/fdsys/pkg/CHRG-112shrg76613/pdf/CHRG-112shrg76613.pdf

In opening that hearing, which included testimony from experts in the oil industry, consumers, businesses, and other interested parties, Senator Sanders discussed several of the many factors potentially affecting the price of gas in northwest Vermont, including large U.S. oil company profits, actions of speculators and others who may be distorting the price discovery mechanism in gas markets, and, with regard to northwest Vermont specifically, lack of

competition among gas wholesalers and retailers. *Id.* at 4. The Senator has long supported legislation targeting the conditions influencing the high cost of gasoline in Vermont and nationwide. *See* S. 2222, 112th Cong. (2d Sess. 2012) (sponsor) (mandating action by the Commodity Futures Trading Commission ("CFTC") regarding activities preventing gasoline markets from accurately reflecting the forces of supply and demand); 159 Cong. Rec. 7310 (2013) (addressing, on Senate floor in support of legislative amendments to curb price manipulation in gasoline markets, "an enormously important national issue, an issue even more important to rural America; that is, the skyrocketing cost of gasoline at the pump"); 158 Cong. Rec. 4306 (2012) (citing constituents' hardships associated with the price of gasoline, as well as record profits of major U.S. oil companies, in support of legislation repealing certain oil company tax breaks); 160 Cong. Rec. S4159 (daily ed. June 26, 2014) (stating, in support of legislation to curtail excessive speculation in oil markets, that "there is a growing consensus that excessive speculation on the oil futures markets is significantly contributing to the high prices the American people are seeing at the pump").[6]

Information the Senator and his office acquired regarding the functioning of the market for gasoline in Vermont and nationally has informed the exercise of his authority to inquire and legislate regarding this issue. "[T]he power to investigate is inherent in the power to make laws because a legislative body cannot legislate wisely or effectively in the absence of information

[6] *See also* S. 1200, 112th Cong. (1st Sess. 2011) (sponsor) (requiring CFTC to set position limits on oil and gas speculative trading); S. 1225, 111th Cong. (1st Sess. 2009) (sponsor) (citing rising gasoline prices in support of legislation directing CFTC use of emergency authority over energy markets); 155 Cong. Rec. 14542-43 (2009) (Sanders floor statement introducing S. 1225); S. 3185, 110th Cong. (2d Sess. 2008) (co-sponsor) ("Prevent Unfair Manipulation of Prices Act," regulating transactions involving energy commodities and strengthening enforcement authorities of Federal Energy Regulatory Commission).

respecting the conditions which the legislation is intended to affect or change." *Eastland*, 421 U.S. at 504 (internal quotation and citation omitted).

Members of Congress and their staff, both formally and informally, gather and receive information in aid of the legislative function from innumerable sources. Their activities in so doing – and the information they receive in the process – are protected by the Speech or Debate Clause. *See U.S. v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (stating, in holding that House member's Florida travel was protected legislative fact finding, that "'[i]nformation gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation'" and hence is protected legislative activity) (quoting *McSurely v. McClellan*, 553 F.2d 1277, 1286 (D.C. Cir. 1975) (en banc)); *Gov't of Virgin Islands v. Lee,* 775 F.2d 514, 521 (3d Cir. 1985) (legislative immunity applies to "fact-finding, information gathering, and investigative activities").

Equally protected from disclosure by the Clause are congressional communications on "any subject upon which legislation may be had." *Eastland*, 421 U.S. at 501, 502, 508; *Gravel,* 408 U.S. at 629 (barring on Speech or Debate grounds testimony "concerning communications between the Senator and his aides during the term of their employment and related to [subcommittee] meeting or any other legislative act of the Senator"); *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015) (internal communications relating to disciplinary matter); *Pittston Coal Group, Inc. v. Int'l Union, United Mine Workers of Am.*, 894 F. Supp. 275, 278 n.5 (W.D. Va. 1995) (finding "internal staff memoranda" protected by the Clause and stating that "[c]ommunication . . . between congressional legislators and their aides is 'an integral part of the

. . . communicative processes by which Members participate in . . . House [and Senate] proceedings'") (citation omitted).

That the expansive scope of Vallee's subpoena may sweep up communications beyond Congress' internal deliberations does not remove the protections of the Speech or Debate Clause. The D.C. Circuit in *Minpeco* rejected on Speech or Debate grounds a similar use of third-party subpoenas, albeit ones much narrower than the one at issue here, to pry into congressional files. In that case, like this one, private defendants in a civil case issued subpoenas to congressional staffers involved in an investigation concerning whether the market in which the defendants operated was operating properly. *Minpeco*, 855 F.2d at 858-59.

The *Minpeco* defendants' subpoenas sought testimony and documents regarding not only communications internal to the House but also the subcommittee's external communications with: (i) the Department of Justice regarding the subcommittee Chairman's "request [for] a . . . perjury investigation" related to the witness's statement; (ii) other federal executive agencies with regulatory authority over the subjects of the investigation; and (iii) "any private litigant or attorneys." *Id.* at 861-63. The instant subpoena seeks a number of similar categories of information. *See* Exh. 1 at Req. Nos. 1, 27, 28 (Department of Justice); Req. Nos. 1, 19, 24 (federal regulatory agencies with authority over defendant's practices); Req. Nos. 6-9, 25, 28 (plaintiffs and their lawyers).

The D.C. Circuit unanimously affirmed the district judge's quashal of the subpoenas in their entirety, recognizing the serious incursion to legislative independence that the subpoenas presented. The D.C. Circuit stated:

> One of [the Speech or Debate Clause's] purposes is to shield legislators from private civil actions that "create [ ] a distraction and force[ ] Members to divert their time, energy, and

> attention from their legislative tasks to defend the litigation." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive.

Minpeco, 855 F.2d at 859.

The court thus declined to order production of information regarding an alleged alteration of a witness's statement before the subcommittee, even if doing so "might reveal illegal acts," because seeking and obtaining information in aid of the legislative function was absolutely protected by the Clause. *Id.* at 860-61. "That," the court stated, "is the end of the matter." *Id*. at 861.

The same result obtained with regard to the subcommittee's external communications with the Department of Justice, federal regulatory agencies, and private lawyers, despite defendants' insistence "that the Speech or Debate Clause does not reach the dissemination of congressional documents outside of Congress." *Id.* at 859, 861-63. That was not only because the subpoenas were issued "in pursuit of the impermissible objective of questioning the manner of subcommittee's investigation" but also because "the effect of the[] [subpoenas'] literal enforcement would be to authorize a fishing expedition into congressional files." *Id.* at 862-63. "Such open-ended discovery," among other reasons, "would be inconsistent with Supreme Court decisions that make clear that the Speech or Debate Clause, *designed to preserve the independence and integrity of the Legislative Branch*, [is to be] read broadly to effectuate its purposes." *Id.* at 863 (emphasis added, citations and quotations omitted); *see also Peoples Temple of Disciples of Christ,* 515 F. Supp. at 249 (quashing subpoena to Congressman seeking

defense evidence in civil case because it "would imperil the legislative independence protected by the Clause" in that Members "would be forced to consider at every turn whether evidence received pursuant to the investigation would subsequently have to be produced in court").

Here, too, authorizing a broad fishing expedition into the thousands of documents implicated by this subpoena "certainly would 'chill' any congressional inquiry; indeed, it would cripple it." *Brown & Williamson*, 62 F.3d at 419 (recognizing in quashing subpoena for congressional documents that the Clause "protect[s] . . . the functioning of Congress . . . [and] its capacity to function effectively if beset by third-party discovery requests" and stating that the "Speech or Debate Clause bars [the] claim" that a party issuing a subpoena to a Member of Congress has "a right to engage in broad scale discovery of documents in a congressional file that comes from third parties"); *Chang v. U.S.*, 512 F. Supp. 2d 62, 66 (D.D.C. 2007) (quashing litigant's subpoena seeking information related to consultant's public speech regarding her investigatory work for city council, stating that court refused "to whittle away at the contours of legislative immunity by allowing defendants to intrude into the legislative process through [the] back door" of seeking legislative information that was made public and that "[t]o find otherwise would severely undermine the purposes of legislative immunity"); *Pittston Coal Group, Inc.,* 894 F. Supp. at 279 & n.5 (quashing subpoena for congressional staffer testimony regarding "documents prepared to facilitate communications with the press," stating that while "congressional staff may be required to testify as to the circumstances of an unprotected act, [they] may not be compelled to provide evidence that would compromise the protection extended by the Constitution to the legislative process itself") (citation and internal quotations omitted). Accordingly, Vallee's subpoena should be quashed.

III. The Subpoena Should Be Quashed Because It Imposes an Undue Burden.

Even if sovereign and legislative immunity did not preclude this Court from exercising jurisdiction over this matter, this subpoena should still be quashed. Under Rule 45:[7]

> An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party. Whether a subpoena imposes an "undue burden" depends upon such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.

Standard Fire Insurance Co. v. Donnelly, 2010 WL 11610603, at *3-*4 (D. Vt. Apr. 2, 2010) (citation omitted). "[C]ourts . . . give special weight to the burden on non-parties of producing documents to parties involved in litigation." *Id.* Moreover, where, as here, the non-party is a government employee:

> courts . . . may take into account not only the direct burdens caused by the testimony, but also "the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations."

Anwar v. Fairfield Greenwich Ltd., 297 F.R.D. 223, 228 (S.D.N.Y. 2013) (quoting *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994)).

The instant subpoena presents an undue burden because it is overly broad and seeks irrelevant information over a nearly seven-year period. "[E]ither irrelevance or overbreadth necessarily establishes undue burden . . . because it necessarily imposes greater hardship than is necessary to obtain proper discovery." *In re Subpoenas for Documents Issued to*

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[7] While the Second Circuit has not decided whether the refusal of a federal agency to permit its employee to divert time from his official duties to produce evidence in a legal proceeding should be evaluated under the APA's arbitrary and capricious standard, or under the Rule 45 undue burden standard, this Court need not make that determination because the subpoena cannot overcome even the Rule 45 standard, which is less deferential to agency determinations. *See Solomon v. Nassau County*, 274 F.R.D. 455, 458 (E.D.N.Y. 2011).

ThompsonMcMullan, *P.C.*, 2016 WL 1071016, at *7 (E.D. Va. Mar. 17, 2016). The subpoena demands production of documents falling within forty-two separate categories, all but two of which seek "all documents and communications" falling within its category. *See* Exh. 1. Twelve of the categories seek documents and communications "with" or "with or about" one or more persons or entities "concerning any of the topics in Request No. 1," which itself lists 13 categories. *Id*. at Requests Nos. 9-17, 20, 22, 29. The burden imposed by requests of such breadth and lack of particularity is magnified by the significant length of the nearly seven-year period at issue. *See Concord Boat Corp. v. Brunswick Corp*., 169 F.R.D. 44, 49 (S.D.N.Y. 1996) (emphasizing "the particularity with which the documents are described" in assessing the burden imposed).

The subpoena also seeks vast amounts of irrelevant information. Over half of the categories seek documents not limited to gas pricing or competition, the subject matter of this case. *See* Exh. 1 at Request Nos. 1 (six categories), 7, 8-18, 20-23, 27-29. Several document categories identifying numerous parties or nonparties do not even *reference* the subject matter of this case. *Id.* at Req. Nos. 8, 18, 21, 23, 27, 28. By way of example, Request No. 27 demands production of "all documents and communications related to . . . meetings with anyone representing the Department of Justice (DOJ), at any time," implicating every such document or communication, including those having nothing to do with the price of gas. *See Premium Serv. Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975) (quashing plaintiff's "sweeping" documentary subpoena seeking from a third party all documents related to defendant); *Raap v. Brier & Thorn, Inc.*, 2017 WL 2462823, at *4 (C.D. Ill. July 7, 2017) (quashing subpoena seeking from nonparty "every document relating to [defendant's]

relationship with [nonparty] without any limitation on time or scope and without any reference to the subject matter of Plaintiff's lawsuit"). This Court should not enforce a subpoena seeking such a "rambling exploration of a third party's files." *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973).

Finally, the subpoena imposes an undue burden for the additional reason that compelled production of the Senator's office communications with private citizens or federal and state officials concerning the public policy matters at issue necessarily would have a chilling effect on those communications and thus impair the effective functioning of the Senator's office. "[I]ndividuals divulge personal information to the government for limited purposes with the expectation that the information will not become available to the general public." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000). Such production should not be compelled absent an extraordinarily compelling need. *See Muslim Cmty Ass'n of Ann Arbor v. Pittsfield Township*, 2014 WL 10319321, at *5 (E.D. Mich. July 2, 2014) (Magistrate Opinion) (quashing subpoena, stating it was "clear that permitting third-party discovery into a private citizen's lawful actions on a matter of public debate would clearly cause her and other individuals to be hesitant about becoming involved in the political process. Indeed protecting against such a chilling effect is one of the First Amendment's very purposes."), *remanded on other grounds*, 2015 WL 404145, at *1 (E.D. Mich. Jan. 29, 2015).

Any asserted need for the testimony and documents sought is undercut by the significant amount of information that is already public – through hearings, debates on the Senate floor, press releases, and media coverage – regarding the Senator's legislative interest in this issue. *See In re Subpoena for Documents*, 2016 WL 1071016, at *8 (stating that "the Court must quash

or modify a subpoena if the information sought is obtainable from another, more convenient source"). Finally, had Vallee believed that non-public information in the Senator's office was of anything more than marginal relevance to the plaintiffs' claims or its defenses, one would imagine that it would not have waited almost three and a half years after commencement of this case to seek production of sweeping evidence on the last day of the discovery. *See Anwar,* 297 F.R.D. at 227–28 (quashing defendants' subpoena for SEC employee testimony, stating that "the Defendants evidently recognized how tangential the testimony of the proposed witnesses would be since they waited until the eleventh hour to notice any SEC personnel for depositions").

Thus, apart from matters of jurisdiction, this subpoena does not even meet the ordinary rules for compelling discovery against non-parties in civil litigation.

CONCLUSION

For the foregoing reasons, the subpoena issued to Mr. McLean should be quashed.

Respectfully submitted,

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Dated: November 29, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2018, I caused to be electronically filed the Motion and Supporting Memorandum to Quash Subpoena Issued to United States Senator Bernard Sanders' Employee Daniel McLean with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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